APPENDIX.

Constitution of the United States.

* * * * * *

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * *

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 17,421

DUN & BRADSTREET, INC.,
Appellant,

vs.

G. C. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[February 3, 1965.]

Before VOGEL and MATTHES, Circuit Judges, and HARPER, District Judge.

HARPER, District Judge:

This is an appeal in a libel action where trial to a jury resulted in a verdict against defendant (appellant) for $40,000.00 actual damages and $10,000.00 punitive damages.

Appellant (also referred to as Dun & Bradstreet or defendant) is a mercantile agency which gathers, evaluates and disseminates to its subscribers confidential credit information. Fordyce Wood Products, Inc. (also referred to as Fordyce or plaintiff) was engaged in the business of manufacturing various wood products in Fordyce, Arkansas, and from 1955 until the time of trial of this cause in December, 1962, was under the management of John H. Stucker, an experienced woodworking manufacturer. In early 1963,

plaintiff was adjudged a bankrupt; thereafter, the trustee was substituted as appellee.

A Notice of Tax Lien (26 USCA 6321) was filed on November 28, 1960, on behalf of the United States against plaintiff in the office of the Circuit Clerk and Recorder of Dallas County, Arkansas, for delinquent taxes withheld by plaintiff from wages paid to its employees for the second quarter of 1960, and penalty for late payment for the first quarter.

On November 29, 1960, Mrs. Morgan, a "record item correspondent" for Dun & Bradstreet in Dallas County, examined the lien records and completed a printed form to report the filing of the lien. While Mrs. Morgan was in the Circuit Clerk's office on November 29th she overheard a deputy clerk say that Mr. Bradley, who had filed the Notice of Tax Lien, had remarked that he was going to the bank and file it. Mrs. Morgan sent her report to the Dun & Bradstreet office in Little Rock, where the following report was prepared and sent to fifty-one Dun & Bradstreet subscribers who had previously requested information regarding Fordyce:

> "FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS—
>
> "Suit styled *U. S. A.* vs. *Fordyce Wood Products, Inc.*, filed Nov. 28, 1960, cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank account of subject by U. S. A. 12-6-60."

Initial distribution of this report was on December 6, 1960.

On March 6, 1961, plaintiff became aware that this report had been published. This resulted in the publication of the following report on March 6, 1961, which was distributed to forty-eight of the fifty-one subscribers who had received the first report, as follows:

> "Further investigation reveals tax lien filed by *U. S. A.* vs. *Fordyce Wood Products, Inc.*, on Nov. 28, 1960, was satisified and released of record, Dec. 1,

1960. It is further understood that lien on bank account has also been satisfied."

The lien was satisfied of record on December 1, 1960. On December 5, 1961, Fordyce filed this suit against Dun & Bradstreet alleging that these two reports were false and defamatory, had been published by defendant with malice, and had caused plaintiff to sustain actual damages. Punitive damages were also sought. Trial to a jury resulted in a verdict against defendant for $40,000.00 actual damages and $10,000.00 punitive damages. Defendant contends that the verdict should be reversed and dismissed, or in the alternative, reversed and remanded for new trial.

The appellant complains that the court committed error in instructing the jury that the reports were false as a matter of law. Instructions must be considered as a whole. The court instructed the jury in part as follows:

> "* * * Before the plaintiff can recover anything in this action it must prove by a preponderance of the evidence: First, that one or both of the reports or statements * * * referred to in the evidence was or were false. Second, that such statement or statements was or were defamatory. And, third, that such statement or statements was or were a proximate cause of damage to the plaintiff. Unless you so find all of those three things, your verdict must be for the defendant. * * *
>
> "Taking up first the element of falsity, although the defendant contends that the statements or reports in question were substantially true, the court now tells you as a matter of law that the statements were in fact false, and that you may consider that the first element of plaintiff's claim has been established as a matter of law."

The defendant contends that the giving of the preceding paragraph was error. The defendant properly objected to this part of the instruction at the time of the trial. In

order to properly determine whether such was error, it is necessary that the entire charge be examined, and it is pertinent that we set out a part of the charge which immediately followed that part of which the appellant complains:

> "I think that I should tell you in this connection that the falsity of the report of December 6 lay in the fact that it advised its recipients that a suit had been filed by the United States against plaintiff, that a federal tax lien had been filed against plaintiff, and, further, that an additional lien had been filed against plaintiff's bank account. Now, while it is true that on November 28, 1960, the Government filed a notice of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, there was never any suit filed against the plaintiff by the Government, and there was never any specific lien filed against the bank account, although, of course, the general notice of lien affected the bank account as well as plaintiff's other assets.
>
> "The second statement was false in that it referred again to a specific lien against the bank account whereas there was never any such specific lien.
>
> "Of course, the mere fact that the statements were false is not alone sufficient to justify you in returning a verdict for the plaintiff. As I have stated, you must further find that the statements, or at least one of them, was or were defamatory, and that the falsity and the defamatory nature, if any, of the statement or statements was a proximate cause of damage to the plaintiff; and the burden is on the plaintiff to establish the defamatory nature of the statements and damage resulting therefrom by a preponderance of the evidence."

While the trial court instructed the jury that the reports were false as a matter of law, the instruction in the next

two paragraphs clearly points out to the jury why the reports were false, and further points out that that part of the reports regarding the filing of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, was true.

The jury was immediately thereafter told that the mere fact the statements were false was not alone sufficient to justify their returning a verdict for the plaintiff, but the plaintiff had to further prove by the preponderance of the evidence that the statements, or at least one of them, were defamatory and that the falsity and the defamatory nature of the statement or statements was the proximate cause of damage to the plaintiff to recover.

The court did not need to present the question of falsity of the reports to the jury since there were no fact questions for the jury to consider. The court properly instructed the jury that the false parts of the reports were that there never was any suit filed against plaintiff by the government and there never was any specific or separate lien filed against the bank account. There was no question or issue as to whether these two parts of the reports were false as the parties stipulated to the following: "No complaint was filed in any court, nor was there any lien filed separately or specifically against the plaintiff's bank account." Since there was no genuine issue of fact on the truth or falsity of the reports, the court's instructions with respect to the reports were proper.

Appellant's main argument is addressed to the point that the "gist or sting" of the reports lay in the true part and the readers of such reports reacted differently; therefore, the court committed error in giving its instruction that the reports were false as a matter of law. Such a contention, however, fails to consider the fact that such considerations actually relate to the matter of whether the reports were defamatory, or if defamatory, were the proximate cause of plaintiff's damages. These considerations were specifically left to the jury for their consideration by the court's instructions. When the paragraph of the charge of which the appellant complains is read as

a part of the whole charge, and we further consider the stipulation of the parties with respect to the reports, the instruction as given correctly stated the applicable law.

Appellant, at the close of plaintiff's case and again at the conclusion of all the evidence, moved for a directed verdict. Subsequent to the jury verdict, appellant moved for judgment n.o.v. (Rule 50(b)). The asserted ground was the insufficiency of the evidence in four particulars: One, fact of legal damage; two, amount of legal damages; three, existence of malice; and four, occurrence of an excessive publication. Appellant contends that the trial court committed error in overruling its motions because the sufficiency of the evidence to support the verdict on the disputed issues of fact must be measured by the federal standard and not by the contended lesser requirements set forth in *Dun & Bradstreet, Inc.* v. *Robinson,* 233 Ark. 168, 345 S.W.2d 34 (hereinafter referred to as the *Robinson* case).

When the sufficiency of the evidence is questioned, the Arkansas and Federal courts will view the evidence in the light most favorable to the plaintiff. *Superior Forwarding Co.* v. *Garner,* 236 Ark. 340, 366 S.W.2d 290; *Aetna Life Ins. Co.* v. *McAdoo,* 115 F.2d 369; *Stofer* v. *Montgomery Ward,* 249 F.2d 285.

The federal standard for testing the sufficiency of the evidence requires that there be "substantial evidence" to support the verdict. *Hanson* v. *Ford Motor Co.,* 278 F.2d 586, 590.

Appellant contends that the Arkansas and federal standards for measuring the sufficiency of the evidence are in conflict and that this court is bound to apply the federal standard. Appellant concedes that prior to the *Robinson* case, the Arkansas and federal standards were the same and that "substantial evidence" was required in either instance to support a jury verdict. Appellant contends, however, that the Arkansas Supreme Court deviated from its former standard of requiring "substantial evidence" in the *Robinson* case, and that the District Court, in following

the *Robinson* decision, judged the sufficiency of the evidence by some lesser standard.

We are of the opinion that the District Court followed the "substantial evidence" standard, and, further, that the opinion of the Arkansas Supreme Court did not depart from the rule of requiring "substantial evidence" in the *Robinson* case, supra, and has not since changed the rule. *Superior Forwarding Co.* v. *Garner, supra.*

Appellant contends that the evidence is not competent to prove the fact of legal damages, the amount of damages, nor does the evidence show that the cause of plaintiff's injuries lay in the false reports.

Appellant argues that the testimony showing the financial posture of plaintiff is not competent to prove damages caused by the false reports. Appellant's contentions, however, must be rejected in light of the *Robinson* case, supra. From the evidence, the jury could reasonably conclude that the plaintiff lost customers who were subscribers of defendant's reports and that two others, namely Shinault and Lumberman's, had to go elsewhere for their needs on account of the effect of the reports on suppliers of raw materials (loss of credit).

Appellant further contends that measured by the standards set forth in *Robinson*, supra, the facts in the case at bar do not constitute a basis upon which a jury could find malice. The applicable standard, as stated in the *Robinson* case, is that plaintiff need not show malice on the part of the defendant in the moral sense (hate, vindictiveness, animosity), but need only show the doing of an act without just cause or excuse, which is in reckless disregard as to its results upon the rights of others. We think that there was sufficient evidence of "conscious indifference" for the district court to properly submit this issue and the matter of punitive damages to the jury. The most significant evidence reveals that there was no review by anyone having authority in appellant's organization. The report of Mrs. Morgan just came into the Little Rock office, went to the typist, and then went out automatically about a week later to the subscribers.

Appellant further contends that the submission of the issue of excessive publication to the jury was error. Plaintiff contends that the submission was not error, but if it was, then it was not prejudicial. Appellant concedes that it is not entitled to reversal and dismissal if the evidence is sufficient to support a finding of either malice or excessive publication. A jury finding in favor of plaintiff on either of those issues would, therefore, destroy the protection of appellant's conditional privilege.

The jury returned a general verdict. Therefore, there is no way to tell whether the jury found excessive publication or not. Certainly the jury did find malice (awarded punitive damages) and, as discussed earlier, there was substantial evidence of malice. Due to these facts we are of the opinion that the matter of whether or not there was sufficient evidence of excessive publication is immaterial, moot, and certainly not prejudicial.

We are of the opinion that there was no error committed in submitting the issues of future damages to the jury and that the verdict is not excessive. *Robinson,* supra.

The appellant further contends the excluded answer of the witness to Cross-Interrogatory No. 8 (a hypothetical question) prevented proof that Bagnal's company would have denied credit to plaintiff had Bagnal only been furnished by the appellant the true part of the first report. Interrogatory No. 8 is not so limited. While it is true that it limits the information furnished by the appellant to the true part of the report, it does not exclude the false information in the report from Bagnal before making a decision, but merely provides it be obtained elsewhere. We quote the applicable part of the question:

> "* * * and you had before you the same credit information from sources other than Dun & Bradstreet that was before you when considering the orders * * *?"

The trial court properly excluded such a question and answer thereto. The answer to this question does not prove what the appellant contends. Further, the District

Court has broad discretion in determining the extent of cross-examination, and there was no abuse of discretion in this case. *Ackelson* v. *Brown*, 264 F.2d 543.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[340 F.2d 882 (1965)]

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 17,421. SEPTEMBER TERM, 1964.

DUN & BRADSTREET, INC., Appellant,

vs.

G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.

Appeal from the United States District Court for the Eastern District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 3, 1965.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE EIGHTH CIRCUIT.

No. 17421—SEPTEMBER TERM, 1964.

DUN & BRADSTREET, INC., Appellant, *vs.* G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.	Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing having been considered in this cause, It is now here Ordered by this Court that the same be, and it is hereby, denied.

March 16, 1965.

Opinion of the Honorable J. Smith Henley, United States District Judge.

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

FORDYCE WOOD PRODUCTS, INC., Plaintiff, *vs.* DUN & BRADSTREET, INC., Defendant.	No. PB-61-C-6

This is a libel action which was tried to a jury and resulted in a verdict in favor of plaintiff, Fordyce Wood Products, Inc., and against the defendant, Dun & Bradstreet, Inc., in the sum of $40,000 actual damages and in the further sum of $10,000 punitive damages. The cause is now before the Court on defendant's motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motions have been submitted on the record in the case, written briefs and oral argument.

The background facts in the case are substantially without dispute and are as follows:

Plaintiff, hereinafter at times called Fordyce, is an Arkansas corporation located in the city of Fordyce, Arkansas, and engaged in the business of the manufacture and sale of lumber and wood products. Since 1955 plaintiff's president has been Mr. J. P. Stucker. Plaintiff purchases much of the materials used in its manufacturing operations on credit, and its ability to obtain credit from suppliers obviously depends upon its credit rating and reputation.

In addition that rating and reputation has a bearing upon plaintiff's ability to secure contracts from purchasers for the future manufacture and delivery of products. Due to shortages of cash and working capital, at all times here pertinent plaintiff's financial position concededly was insecure.

The defendant, hereinafter at times called simply Dun & Bradstreet, is a nationally known financial rating and reporting concern [871] and renders such services to its subscribers for compensation. Dun & Bradstreet maintains an office in the City of Little Rock, Arkansas, and has individual correspondents scattered throughout the State whose function it is to obtain and transmit to the Little Rock office from time to time information relative to suits, judgments, and liens appearing on the official records of the counties wherein the correspondents reside. The information which these correspondents glean from the records is transmitted to Little Rock where it is appraised, formulated into reports, and disseminated to subscribers as the occasion arises. It does not appear that the local correspondents are given any special training or instructions as to what they are to do, or that any particular care is used in their selection in the first instance.

The information collected by the correspondents is transmitted to defendant's Little Rock office on printed forms furnished by defendant. Those forms are printed on both sides, one side being called the "Court Side," and the other being called the "Record Side." On the Court Side of the forms are blank spaces for the insertion of information relative to suits, judgments, and executions. On the Record Side are spaces for the insertion of information relative to real estate and chattel mortgages, deeds, leases, and bulk sales notices.

Somewhat strangely, the printed forms have no spaces for the insertion of notices of statutory liens, as such. For example, no specific spaces are alloted for information relative to laborers' or mechanics' liens or to federal tax liens, although the filing of notices of such liens is

common in Arkansas as elsewhere, and, of course, such liens have a distinct bearing on the credit and solvency of the persons or corporations subject to the liens.

On and prior to November 28, 1960, Fordyce was indebted to the United States on account of income taxes withheld from employees wages for the first and second quarters of 1960, and on November 28 [872] the Government caused to be filed of record in the office of the Circuit Clerk of Dallas County, where Fordyce is located, a general notice of a federal tax lien reciting the Government's claim. On December 1, 1960, Fordyce discharged the lien in full and it was marked satisfied of record.

The notice of lien was filed during the morning hours of November 28, and later on the same day Dun & Bradstreet's local correspondent, a Mrs. Morgan, found the notice of lien in the course of her examination of the records. While she was in the Clerk's office she heard one of the deputy clerks say to some other individual that the internal revenue agent who had filed the notice of lien had said upon leaving the Clerk's office that he was going to the bank and put a lien on the bank account.

In reporting this filing to Dun & Bradstreet Mrs. Morgan chose to use the Court Side of the printed form. In making the report she showed the United States as plaintiff and Fordyce as defendant. In the blank which called for identification of the Court in which the proceeding was pending she inserted the words "lien record." And she then went on to show that the claim was for withholding taxes for the first and second quarters of 1960. Still further, she went on to indicate that a separate lien had been filed against the bank account of Fordyce.

At this time there were a number of Dun & Bradstreet suppliers and prospective suppliers who were interested in the financial status of Fordyce, and on December 6, 1960, Dun & Bradstreet sent out a report based upon Mrs. Morgan's report just mentioned. The data which Mrs. Morgan transmitted to Little Rock emerged from the Little Rock office in the following form:

"FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS . . . Suit styled U.S.A. *vs.* Fordyce Wood Products, Inc., filed Nov. 28, 1960 cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank of subject by U.S.A. 12-6-60 (PR 51)."

[873] As a matter of fact, the Government had filed no suit against Fordyce and there was no specific lien filed against the Fordyce bank account, although, of course, the bank account was subject to the general lien, notice of which had been filed on November 28. Further, by December 6, the lien had been satisfied in full. Prior to disseminating the notice Dun & Bradstreet made no effort to determine whether the lien had been satisfied since it is not the custom of Dun & Bradstreet to keep up currently with satisfactions of encumbrances, and it makes no investigations with respect to such satisfactions except once a year when the status of all the subjects of its investigations is given an overall review. These annual investigations are not made by the same people who send in the original reports, but by other Dun & Bradstreet employees who work directly out of the Little Rock office.

Fordyce was not inquired of by Dun & Bradstreet prior to the dissemination of the December 6, 1960, report and did not learn of its existence until March, 1961, when Mr. Stucker by accident learned that the report had been sent out and also learned its contents.

Stucker or someone in his behalf immediately communicated with the Little Rock office of the defendant and advised it of the true state of affairs, including the fact that the lien had been satisfied on December 1. Defendant then sent out the following report:

"Further investigation reveals tax lien filed by U.S.A. vs. Fordyce Wood Products, Inc., on Nov. 28, 1960, was satisfied and released of record, Dec. 1, 1960. It is further understood that lien on bank account has also been satisfied. 3-6-61 (066c-9)."

It will be observed that this March report, although it did not refer to any suit, did not admit the existence of any error in the December, 1960, report, and it also again referred to a specific lien on the bank account whereas, as pointed out, there never was any such lien.

It is the theory of plaintiff that the December 6, 1960, report was false and defamatory and that it damaged plaintiff heavily in [874] its business and reputation, and that this damage was enhanced rather than mitigated by the March, 1961, report. It is also the theory of plaintiff that the acts of Dun & Bradstreet in disseminating the reports in question were characterized by "malice," and that defendant is liable for both actual and punitive damages.

As to the falsity of the report of December 6, 1960, it was contended by plaintiff at the trial that the report was false in three respects, namely, that it referred to a non-existent lawsuit, that it referred to a non-existent specific lien on the bank account, and that it failed to reflect the satisfaction of the lien on December 1, 1960. The March, 1961, report was contended to be false in that it again referred to the specific lien on the bank account.

It is the position of the defendant that the reports in question were substantially, if not literally, true, that they were not defamatory, and that they were not damaging. Further, defendant contends that the dissimenation of the reports was conditionally privileged, that the acts of defendant's employees were not malicious, and that defendant is not liable for any damages resulting from the dissemination of the reports even if they were false or inaccurate.

In answer to the claim of privilege plaintiff reiterates its contention that the dissemination of the reports was malicious in the impersonal sense recognized by the Supreme Court of Arkansas in the case of Dun & Bradstreet v. Robinson, 233 Ark. , 345 S. W. 2d 34. Plaintiff claims also that any conditional or qualified privilege which may have appertained to the reports originally was abused and lost by excessive publication, in that the reports were disseminated to persons who had not requested

them and who had no interest in the subject matter of the reports.

At the close of plaintiff's case the defendant moved for a directed verdict, and ruling on the motion was reserved. The motion was renewed at the close of all of the testimony and ruling was again reserved and the case submitted to the jury.

[875] There was and is very little dispute as to the underlying principles of law governing the case, and those principles were incorporated in the charge given to the jury. The jury was told, in substance, that the burden was upon the plaintiff to prove by a preponderance of the evidence that one or both of the reports was or were false and was or were defamatory and damaging,[1] and that if the jury did so find, its verdict would be for plaintiff unless it found for the defendant on its claim of privilege.

As to privilege, the jury was told that as a matter of law the dissemination of the reports was conditionally privileged, and that even though the jury might find that the reports were false, defamatory, and damaging, still the verdict must be for the defendant unless it appeared from a preponderance of the evidence that the dissemination of one or both of the reports was malicious, or unless it appeared with a like degree of certainty that the qualified privilege had been abused by an excessive publication of either or both of the reports. The jury was instructed still further that the burden of proving by a preponderance of

[1] The case was tried upon the theory that it was incumbent upon plaintiff to prove that as a result of one or both of the reports plaintiff had sustained some actual special damage. Plaintiff made no contention that it was entitled to general compensatory damages in the absence of proof of special damage. That proof of special damage is necessary in order to justify a recovery on account of a report similar to those involved here seems to have been the view taken by the Court in Robinson, supra. Cf. Restatement, Torts, §§569 et seq.; 1 Harper & James, The Law of Torts, §5.9; and the early Arkansas case of Obaugh v. Finn, 4 Ark. 110, to the effect that unlike slanders, which may be either "slanders per se" or "slanders per quod," all libels are "libels per se" and justify a recovery of substantial compensatory damages without proof of any specific actual damage.

the evidence that the privilege had been lost by the presence of malice on the part of defendant or by excessive publication was upon the plaintiff.

The jury was likewise instructed as to malice and excessive publication in terms to which defendant did not object. As a matter of fact, the defendant did not object to any of the language of the charge, as language, or as failing in the abstract to state the law correctly. The defendant did object vigorously to certain [876] portions of the instructions as not being applicable to the facts or not justified by the evidence.

In connection with the falsity of the reports, the jury was instructed that as a matter of law the first report was false in that it referred to a lawsuit which had never existed and that it referred to a specific lien on plaintiff's bank account whereas there had never been any such specific lien. And the jury was told also that the second report was false as a matter of law in that it again referred to the non-existent specific lien on the bank account. The Court refused to instruct that the first report was false in that it failed to show the satisfaction of the lien prior to the dissemination of the report, the Court taking the view that while this omission might render the report incomplete it would not of itself make the report false.

All questions as to the defamatory nature of the reports, damages, both actual and punitive, privilege, and excessive publication were left for determination by the jury. To the extent that it may appear necessary, references will be made herein to those portions of the charge.

I.

In support of its motion for judgment notwithstanding the verdict the defendant contends, ultimately, that the verdict is not supported by substantial evidence. To put it another way, defendant's ultimate contention is either that there is no substantial evidence that the reports in question were false, defamatory, and damaging, or that

the claim of privilege has been established as a matter of law, there being no substantial evidence of malice or abuse of the privilege by excessive publication. In evaluating this contention the Court is required to view the record in the case in the light most favorable to the plaintiff.

From its consideration the Court is convinced that the statements in question were false as a matter of law in the respects [877] mentioned to the jury. It is also convinced that on the evidence the jury was justified in finding that the statements were defamatory,[2] and that their false and defamatory nature was a proximate cause of actual financial damage to plaintiff.

With regard to malice and excessive publication, defendant concedes that as far as its motion for judgment notwithstanding the verdict is concerned, substantial evidence of either malice or excessive publication would be sufficient to justify the jury in finding against the defendant on its claim of privilege. Since the Court is persuaded that there was substantial evidence from which the jury could have found malice,[3] and since it is clear from the

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[2] The jury was told: "In order for a financial report dealing with the affairs of a corporation to be 'defamatory,' the report must have a meaning which tends to discredit the financial standing of the corporation in the community in which it does business or in the trade in which it is engaged, or which tends to prejudice it in the conduct of its trade or business, or to deter third persons from dealing with it, or to impute to the corporation insolvency, bankruptcy or want of credit. And this meaning must have been the one which the recipients of the report either correctly, or mistakenly but reasonably, understood that the report was intended to express. In determining whether the reports here involved were defamatory, you should consider them in their entirety and as they relate to each other; and the words contained in the reports should be given their plain, natural and commonly accepted meanings."

[3] "Malice" was defined to the jury in the language used by the Court in the Robinson case, supra. The jury was told:

"'Malice', as I have used the term, means the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill will or evil intent, or in the impersonal sense, such as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will.

fact that punitive damages were awarded that malice was found, it is unnecessary at this point to consider whether there was substantial evidence of excessive publication. That question will be considered in connection with defendant's alternative motion for a new [878] trial.

While defendant discusses the question of the falsity of the statements in connection with its motion for a new trial rather than in connection with its motion for judgment notwithstanding the verdict, the Court prefers to take up that question at this point in the opinion.[4]

It is the position of the defendant that the "gist" or "sting" of the reports was that plaintiff was having tax difficulties with the Government and that a notice of tax lien had been filed against plaintiff, and that this was true, and that the statements taken as a whole were substantially true, or that at least it was for the jury to say whether the statements were true or false. The Court cannot accept this argument.

In the Court's view a statement that the Government has filed a lawsuit against a taxpayer, a most unusual collection procedure, cannot reasonably be equated with a statement that the Government has merely filed a notice of lien. Nor, in the Court's estimation, can reasonable men differ with respect to the truth or falsity of statements which indicate the existence of a specific lien against a taxpayer's bank account when no such specific lien existed.

"I might say, Members of the Jury, that the plaintiff does not contend in this case that the defendant acted with malice in the personal sense just outlined, but it does contend that the defendant acted with malice in the impersonal sense, that is to say that the publications of the statements as published were without just cause or excuse, and were characterized by such a conscious indifference or reckless disregard as to their results or effects upon the rights of plaintiff as to constitute ill will."

[4] In a pre-trial motion for summary judgment defendant took the position that as a matter of law the statements were substantially true. That motion was overruled, and, as stated, the jury was instructed ultimately that the statements were false as a matter of law.

It must be remembered that the truth of a statement is one thing; whether a statement is defamatory or damaging is another question, and the statements here involved were simply not true either literally or substantially.

As has been said, the question of the defamatory nature of the statements was left to the jury, and the jury could have found the statements defamatory in the sense that they implied that plaintiff was having more than ordinary tax problems, and that the Government had found it necessary not only to file a general notice of [879] lien, but also to take specific action relative to plaintiff's bank account, and to file a lawsuit against plaintiff. Certainly a jury might consider that such statements would be more damaging to plaintiff than a mere statement that a single notice of lien had been filed.

On the matter of damages defendant argues that the evidence was insufficient to establish either the fact of legal damage or the amount of legal damages sustained, and that such insufficiency in either respect would entitle defendant to a judgment notwithstanding the verdict. In considering this argument the Court will say at the outset that it does not agree with defendant that in order to prevail ultimately plaintiff was required to establish the amount of its actual damages in terms of dollars and cents. It is sufficient if plaintiff has established by a preponderance of the evidence that it has sustained actual damages in some substantial amount.

In the course of the trial much evidence was produced on the question of whether the false and defamatory nature of the statements had actually damaged Fordyce in its business, credit, or reputation. It would prolong this opinion unduly to undertake to abstract or analyze this evidence in detail. Suffice it to say that in the Court's view there was substantial evidence from which the jury could find that as a proximate result of the falsity and defamatory nature of one or both of the statements plaintiff sustained actual damage in a substantial amount. Questions as to the amount of actual damages awarded by the jury,

and as to the alleged excessiveness of the verdict, will be discussed in connection with the motion for a new trial.

The question of whether the evidence justified the finding of malice implicit in the jury's verdict must, of course, be decided by reference to Arkansas law. In Dun & Bradstreet v. Robinson, supra, the Supreme Court of Arkansas adopted a broad concept [880] of malice in cases involving a claim of conditional privilege advanced by a financial reporting agency. Robinson was a produce dealer engaged in business at Springdale, Arkansas. In the course of her investigation of another concern the local correspondent of Dun & Bradstreet heard a rumor that Robinson had gone out of business and pursuant to instructions reported this rumor to Dun & Bradstreet's Little Rock office. Without making any effort to check the truth of the report Dun & Bradstreet mailed to 36 of its subscribers a report as follows: "It is currently reported subject discontinued operations February 26, 1958. Further investigation is underway for more complete details." This report was sent out on March 3, 1958. After notifying the Little Rock office of the rumor, the local correspondent talked with Robinson's secretary who denied the truth of the rumor, and the local correspondent advised the Little Rock office of the denial. On March 4, the Little Rock office advised its subscribers that Robinson "was interviewed recently and he denied reports that operation discontinued, or that he has sustained any business reverses." Thereafter, Robinson sued Dun & Bradstreet and recovered judgment for $30,000 actual damages. The Supreme Court of Arkansas affirmed the Circuit Court, rejecting appellant's contentions that the reports were true, that they were privileged, and that there was no substantial evidence of damage.

In discussing the question of privilege the Court declined to adopt appellant's argument that it was incumbent upon the plaintiff to show "actual malice," i.e. ill-will, spite, or a grudge against plaintiff on the part of Dun & Bradstreet, and held it sufficient for plaintiff to show malice in an "impersonal sense," that is to say it was suffi-

cient if plaintiff had shown that the publications complained of were disseminated with a reckless disregard of the rights of others amounting to illwill. The Court then held that there was substantial evidence to sustain the jury's findings of impersonal or constructive malice. It was said in that connection [881] (pp. 39-40 of 345 S.W. 2d):

> "* * * Dun & Bradstreet enjoys the implicit confidence of its subscribers, as attested by witnesses in the cause before us. This confidence in the accuracy of Dun & Bradstreet reports places an even greater responsibility upon the company, and requires that its reports be compiled with regard to the effect that such report may have upon the rights or feelings of the person reported on, if it should develop that such information given is false. In applying the law given by the court in its instruction heretofore quoted, we look to the evidence to determine whether a jury question was presented. Clearly, we think the answer is 'Yes.' It would have been an easy matter for Mrs. Lawrence to have called Robinson on February 27th before communicating the rumor to the Dun & Bradstreet offices in Little Rock; in fact, Mrs. Lawrence did call Robinson's office the next day. Likewise, though the Little Rock office asked Mrs. Lawrence on February 28th for additional information, the special report to subscribers was mailed out from Little Rock before receiving Mrs. Lawrence's response to this request; at that, it was not sent until Monday, March 3rd, four days after receiving her telephone call. This four day period between the receipt and dissemination of this information certainly indicates that the company did not consider the report so startling and important that there was a pressing need for immediate communication to subscribers, and it seems that prudence would have dictated that the company await further clarification, particularly since the information was obtained from an inexpe-

> rienced operator. By waiting one more day, the company would not have found it necessary to send out the second report. We hold there was substantial evidence to the effect that Mrs. Lawrence and Dun & Bradstreet acted with conscious indifference and reckless disregard of the rights of Robinson in publishing the report of March 3rd; it follows that the protection afforded by the fact that the communication was conditionally privileged, was lost."

Naturally, there are differences between the facts in the instant case and the facts in Robinson, but in the Court's eyes the acts of defendant in this case were just as blameworthy as its acts in the Robinson case, and the jury was as much justified in finding constructive malice here as the jury was in that case.

The report which Mrs. Morgan mailed to the defendant's Little Rock office, referring as it did to the United States as plaintiff and Fordyce as defendant, while at the same time saying that the Court in which the proceeding was pending was the "lien record," and referring to a specific lien on the bank account of Fordyce, should have been recognized as unusual by any person having even an ordinary familiarity with federal tax collection procedures, such as employees of defendant's Little Rock office might reasonably be expected to have. The slightest inquiry would have revealed [882] that there was no lawsuit, and that no specific action had been taken with respect to the bank account of plaintiff. Such inquiry was not made. Nor was the March 6, 1961, report in any sense a full and frank confession that the first report had been in error in any respect, and there was a repetition of the reference to a specific lien on the bank account. While there is nothing to indicate that defendant's treatment of plaintiff was different from that which might have been accorded to any other subject of investigation in the same or similar circumstances, the Court thinks that the jury was justified in concluding that Dun & Bradstreet sent out its reports of adverse information with a reckless disregard of the truth

or falsity of those reports and of the effect which they may have on the plaintiff.

From what has been said it follows that the motion for judgment notwithstanding the verdict will be denied.

II.

As is not unusual with post-trial motions, defendant's motion for judgment notwithstanding the verdict and its alternative motion for a new trial overlap to some extent. Contentions disposed of in connection with the principal motion will not be discussed in connection with the alternative motion.

The most serious questions raised by the motion for a new trial relate to the sufficiency of the evidence to justify the submission to the jury of the issue of abuse of privilege by excessive publication, to the sufficiency of the evidence to sustain the dollars and cents award of actual damages, and to the alleged excessiveness of the verdict.

In passing upon these questions it is well to keep in mind that the granting or denying of a motion for a new trial rests within the sound discretion of the Court. Chicago & N. W. Ry. v. Britten, 8 Cir., 301 F. 2d 400; Tsai v. Rosenthal, 8 Cir., 297 F. 2d 614; Gallon v. Lloyd-Thomas Co., 8 Cir., 261 F. 2d 26. And [883] a new trial will not be granted to correct an insubstantial or harmless error. Stanczak v. Pennsylvania R. Co., 7 Cir., 174 F. 2d 43; Freid v. McGrath, C.A. D.C., 133 F. 2d 350; Crockett v. Boysen, D.C. Minn., 26 F.R.D. 148. As was said in Duke v. St. Louis, S.F. R. Co., C.C. Ark., 172 Fed. 684, 686, a new trial will not be granted "unless it is reasonably clear that prejudicial error has crept into the record," and that the courts are always reluctant to grant new trials when "convinced that the verdict is in favor of the right party."

The evidence in support of plaintiff's claim of excessive publication of the reports was weak and was largely circumstantial in nature. There was direct testimony from only one witness that he received the December 6 report when he had not asked for any report on plaintiff, and that

testimony was not entirely satisfactory. However, as stated, the plaintiff is entitled to have whatever evidence there was viewed in the light favorable to it and to have the benefit of all inferences in its favor which may be deduced rationally from the evidence, and the Court is not prepared to say that plaintiff's evidence of excessive publication was so weak as to be insubstantial.

But even if the Court is wrong in that connection, nevertheless the Court is persuaded that the error, if any, in submitting that issue to the jury was not prejudicial. The evidence was weak, and it is to be doubted that the jury in fact found any excessive publication, although of course, the Court cannot say affirmatively that there was no such finding. It is clear that there was substantial evidence of malice and there was a finding of malice. Such evidence and finding were sufficient to justify an award in plaintiff's favor irrespective of excessive publication, and the Court does not believe that the question of excessive publication had any substantial effect on the result of the case or on the size of the verdict.

[884] As to the question of whether the evidence sustained the amount of actual damages awarded to plaintiff, the jury was instructed that if it found for the plaintiff it should award as actual damages such sum as the evidence might show would fairly and reasonably compensate the plaintiff for the actual damages sustained by plaintiff up to the time of trial and such, if any, as the evidence might show with reasonable certainty plaintiff would sustain in the future resulting from the falsity and from the defamatory nature, if any, of the respective reports. The jury was also told that its award of actual damages must be reasonable, that it must be based upon evidence and not upon speculation or conjecture, that actual damages incurred up to the time of trial might be shown by a preponderance of the evidence, but that future damages must be shown by the evidence with a reasonable degree of certainty. The jury was also instructed that plaintiff was not required to show its actual damages with mathematical exactitude, but that it was required to show such damages as a matter of fair and rea-

sonable estimate based upon the evidence. The jury was then instructed:

> "In measuring plaintiff's actual damages, if you measure them, you should take into consideration the evidence produced by the respective parties bearing upon plaintiff's claimed loss of credit, loss of business and customers, loss of business reputation and good will, and loss of profits, alleged to be attributable to the falsity of the statements and the alleged defamatory nature thereof, and give to all of that evidence the weight which you think it should have in determining the amount of actual damages, if any, that should be awarded plaintiff."

Again without going into detail, the Court is satisfied that there was substantial evidence that plaintiff had sustained up to the time of trial and would sustain in the future damages to its credit, business, reputation, and good will, and that it had sustained and would sustain losses of profits. While the sum of $50,000 awarded by way of actual damages is large, and, indeed, is considerably larger than the Court would have awarded, it cannot be said that the sum arrived at by the jury is not sustained by the [885] evidence when viewed in the light most favorable to the plaintiff.

It is true that plaintiff's evidence as to actual damages was general and rather indefinite, but it does not appear to the Court to differ qualitatively from the evidence which the Supreme Court of Arkansas held in *Robinson*, supra, to be sufficient to sustain the verdict arrived at in that case. The elements of actual damage which the jury was permitted to consider in this case were essentially the same elements which the jury was permitted to consider in *Robinson*, and the instructions as to actual damages conformed to the law as expressed in *Robinson*.

With respect to the alleged excessiveness of the verdict, the award of $10,000 as punitive damages gives the Court

no concern. The award of $40,000 as actual damages is a large one and is larger than the Court would have voted for had it been a member of the jury or would have awarded had the case been tried to the Court. But again viewing the evidence in the light most favorable to plaintiff, the Court is unwilling to say that the verdict is monstrous, shocking, or outrageous or outside the bounds of the testimony. There was certainly nothing in the case to inflame the passions or prejudices of the jurors, and during the week long trial none of the capable attorneys for the respective parties undertook to inject any passion into the case. While the size of the verdict for actual damages gives the Court concern, the Court does not feel justified in disturbing it.

One other matter is to be mentioned. Defendant assigns as prejudicial error the action of the Court in excluding one question and answer appearing in the deposition of L. N. Bagnel, which deposition was taken on interrogatories and cross interrogatories. The question excluded was:

> "If the (December 6, 1960 report) had stated only that a tax lien had been filed by the Federal Government on November 28, 1960, against Fordyce Wood Products, and you had before you the same credit information from sources other than Dun & Bradstreet that was before you when considering the orders [886] reflected by Exhibit 'A' and 'B', would your decision as to accepting the orders been any different?"

The excluded answer was "No."

The question was in poor form, it dealt with a purely hypothetical situation, and it was propounded in connection with defendant's trial theory that plaintiff would have suffered as much from a true report of the filing of the tax lien as it did from the December 6, 1960, report as written and, therefore, could not complain of the contents of that report. The Court held at the time and now holds that the question was not whether plaintiff would have

been damaged by a true report, but whether it was damaged by the false reports which were sent out, and is of the opinion that the exclusion of the question and answer just discussed was proper. In any event, the Court does not feel that the exclusion of this one question and this one answer had any prejudicial effect on defendant.

Both the principal and alternative motions will be denied, and judgment on the verdict will be entered.

Dated this 24 day of June, 1963.

/s/ J. Smith Henley,
United States District Judge.